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| Suite 500 | | | | |
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

DocketingDept@young-thompson.com

| | | |
|------------------------------|--------------------------------------|---------------------------------------|
| Office Action Summary | Application No. 10/588,492 | Applicant(s) HOUGARD ET AL. |
| | Examiner COURTNEY BROWN | Art Unit 1617 |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 14 March 2011.
- 2a) This action is FINAL. 2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 1,2 and 4-15 is/are pending in the application.
 - 4a) Of the above claim(s) 9,11 and 14 is/are withdrawn from consideration.
- 5) Claim(s) _____ is/are allowed.
- 6) Claim(s) 1-2,4-8,10,12 and 13 is/are rejected.
- 7) Claim(s) _____ is/are objected to.
- 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 - a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO/SB/08)
 Paper No./Mail Date _____
- 4) Interview Summary (PTO-413)
 Paper No./Mail Date _____
- 5) Notice of Informal Patent Application
- 6) Other: _____

DETAILED ACTION

Acknowledgement of Receipt/Status of Claims

This Office Action is in response to the amendment filed March 14, 2011. Claims 1-2 and 4-15 are pending in the application. Claim 3 has been cancelled. Claims 1,2,4-8,10,12,13 and 15 have been amended. Claims 9, 11 and 14 have been withdrawn as being directed to a non-elected invention. Claims **1-2,4-8,10,12, 13 and 15** are being examined for patentability.

Withdrawn Rejections

Applicant's amendments and arguments filed March 14, 2011 are acknowledged and have been fully considered.

The following rejections and/or objections are either reiterated or newly applied. They constitute the complete set of rejections and/or objections presently being applied to the instant application. Claims 1-4, 4-8, 10, 12 and 13 were rejected under 35 U.S.C. 103(a) as being unpatentable over Karl et al. (US Patent Application 2005/0132500A1) and/or Skovmand (WO 01/37662 A1) in view of Institut de recherché pour le development, IRD (*Synergy between insecticide and repellent to combat malaria-carrying mosquitoes*, January 2001). This rejection **is withdrawn** in view of Applicant's

submission of documentary evidence which proves that the IRD webpage incorrectly recited a January 2001 date.

New Rejection(s)

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

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The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1-2,4-8,10,12, 13 and 15 are newly rejected under 35 U.S.C. 103(a) as being unpatentable over Karl et al. (US Patent Application 2005/0132500A1, previously cited) and/or Skovmand (WO 01/37662 A1,previously cited).

Applicant's Invention

Applicant is claiming a product comprising at least one non-pyrethroid insecticide and at least one insect repellent, the concentration of the insecticide in the product being lower than its lethal concentration 100 (LC100) when the insecticide is used alone, and the concentration of the insect repellent in the product being lower than the concentration of the insect repellent procuring a maximum repellent effect when the insect repellent is used alone, as combination products for a use that is simultaneous, separated or spread over time in the preparation of an insecticide composition.

**Determination of the scope and the content of the prior art
(MPEP 2141.01)**

Karl et al. teach an insecticide composition for application to a textile material or plastic material wherein the composition comprises a mixture of at least one insecticide and/or at least one repellent (claim 1 of Karl et al.). The insecticide is selected from organophosphorous compounds such as pirimiphos-ethyl and piriphos-methyl (claim 4 of Karl et al., elected insecticide and limitation of instant claims **1 and 7**) and the repellent is selected from compounds such as N,N-Diethyl-meta-toluamine (i.e., DEET, claim 4 of Karl et al. and elected repellent and limitation of instant claims **1,8 and 10**). The composition comprises from about 0.001 to 95% by weight of the insecticide and/or repellent (claim 7 of Karl et al., limitation of instant claim **6**). Karl et al. teach impregnated textile material and a process for the impregnation of textile material which may be in the form of garments such as socks, trousers, shirts, etc. and nettings which are used for mosquito nets or covering (see claims 13 and 14 of Karl et al. and [0068], limitation of instant claims **12, 14 and 15**).

Skovmand teaches an impregnated netting or fabric for insect or tick and/or repellence of an insect or tick comprising an insecticide and/or a repellent wherein the insecticide is selected from organophosphorous compounds such as pirimiphos-ethyl and piriphos-methyl (claims 1 and 8 of Skovmand, elected insecticide and limitation of instant claims **12 and 14**) and the repellent is selected from compounds such as N,N-Diethyl-meta-toluamine (i.e., DEET, also claims 1 and 8 of Skovmand, elected repellent

and limitation of instant claims **12 and 14**). Skovmand teaches a process for impregnation of a fabric or netting as well as a composition for impregnation of fabrics comprising the aforementioned insecticide/repellant combination wherein the composition comprises from about 0.001 to 95% by weight of the insecticide and/or repellant (claims 18 and 9 of Skovmand, limitation of instant claims **1, 6-8,10 and 15**).

**Ascertainment of the difference between the prior art and the claims
(MPEP 2141.02)**

The difference between the invention of the instant application and that of Karl et al. and Skovmand is that Karl et al. and Skovmand do not expressly teach that the concentration of the insecticide in the product being lower (i.e., LC20 to LC40, and LC30) than its lethal concentration 100 (LC100), when it is used alone, and that the concentration of the insect repellent in the product being lower than the concentration of the insect repellent procuring a maximum repellent effect and a protective effect when it is used alone (limitation of instant claims **1-2 and 4-5**).

Finding of prima facie obviousness

Rationale and Motivation (MPEP 2142-2143)

The teachings of Karl et al. and Skovmand are directed to combinations of repellents and non- pyrethroid insecticides. Therefore, it would have been *prima facie* obvious to one of ordinary skill in the art at the time of the invention to combine the teachings Karl et al. and Skovmand to arrive at products containing at least one non-pyrethroid insecticide and at least one insect repellent wherein the concentration of the insecticide in the product being lower (i.e., LC20 to LC40, and LC30) than its lethal concentration 100 (LC100), when it is used alone, and that the concentration of the insect repellent in the product being lower than the concentration of the insect repellant procuring a maximum repellent effect and a protective effect when it is used alone. It is known in the art that combining insecticidal actives increases the efficacy of an insecticide such that the maximum level of insects killed for a given application rate of an insecticide is increased, or alternatively, the application rate of an insecticide giving the maximum level of insects killed can be reduced. One would have been motivated to combine these references in order to receive the expected benefit of an increase in the efficacy of the claimed insecticide. Thus, one would have been motivated to make this combination in order to receive the expected benefit of having products impregnated with low doses of repellents and insecticides that will last longer due to the combination of the non-pyrethroid insecticide and the repellent .

In light of the forgoing discussion, the Examiner concludes that the subject matter defined by the instant claims would have been obvious within the meaning of 35 USC 103(a).

From the teachings of the references, it is apparent that one of ordinary skill in the art would have had a reasonable expectation of success in producing the claimed invention. Therefore, the invention as a whole was *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the teachings of the cited references, especially in the absence of evidence to the contrary.

Examiner's Response to Applicant's Remarks

Applicant's arguments filed on March 14, 2011, with respect to the 103 rejection of claims 1-4, 4-8, 10, 12 and 13 as being unpatentable over Karl et al. (US Patent Application 2005/0132500A1) and/or Skovmand (WO 01/37662 A1) in view of Institut de recherché pour le développement, IRD (*Synergy between insecticide and repellent to combat malaria-carrying mosquitoes*, January 2001) have been fully considered but are moot in view of a new grounds of rejection. However, Applicant's arguments pertaining to the teachings of Karl et al. and Skovmand have been addressed because they have been used in the instant rejection.

With regards to the teaching of Karl et al., Applicant argues that KARL discloses insecticide compositions for application to a textile or plastic material and that the main aim is to provide compositions that are not washed out and in which bioavailability of the insecticide for killing insects is maintained after multiple washes. Applicant argues that KARL discloses the insecticides and repellents in a concentration of 0.5 to 60% (e.g.,

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paragraphs [0149] and [0308]). Applicant argues that the netting material is treated with 25 to 200 mg/m² of alpha-cypermethrin (Example, page 15), which is a pyrethroid insecticide and that the bioassay results presented in Table 2 (page 17) clearly show 100% mortality after 24 hour exposure of mosquitoes to composition A17, which contains alpha- cypermethrin at 200mg/mm². Applicant argues that no repellent is present in the specific compositions disclosed in KARL. Thus, KARL fails to teach or suggest a concentration of insecticide below lethal concentrations (below LC100) or a concentration of repellent below maximum repellent effect. However, Applicant's arguments are not persuasive. When considering a prior art's teaching, the whole reference is considered, including the examples. Further, according to MPEP 2123, "patents are relevant as prior art for all they contain":

2123 Rejection Over Prior Art's Broad Disclosure Instead of Preferred Embodiments [R-5]

I. PATENTS ARE RELEVANT AS PRIOR ART FOR ALL THEY CONTAIN

"The use of patents as references is not limited to what the patentees describe as their own inventions or to the problems with which they are concerned. They are part of the literature of the art, relevant for all they contain." *In re Heck*, 699 F.2d 1331, 1332-33, 216 USPQ 1038, 1039 (Fed. Cir. 1983) (quoting *In re Lemelson*, 397 F.2d 1006, 1009, 158 USPQ 275, 277 (CCPA 1968)).

A reference may be relied upon for all that it would have reasonably suggested to one having ordinary skill the art, including nonpreferred embodiments. *Merck & Co. v. Biocraft Laboratories*, 874 F.2d 804, 10 USPQ2d 1843 (Fed. Cir.), cert. denied, 493 U.S. 975 (1989). See also >*Upsher-Smith Labs. v. Pamlab, LLC*, 412 F.3d 1319, 1323, 75 USPQ2d 1213, 1215 (Fed. Cir. 2005)(reference disclosing optional inclusion of a particular component teaches compositions that both do and do not contain that component);< *Celeritas Technologies Ltd. v. Rockwell International Corp.*, 150 F.3d 1354, 1361, 47 USPQ2d 1516, 1522-23 (Fed. Cir. 1998) (The court held that the prior art anticipated the claims even though it taught away from the claimed invention. "The fact that a modem with a single carrier data signal is shown to be less than optimal does not vitiate the fact that it is disclosed.").

>See also MPEP § 2131.05 and § 2145, subsection X.D., which discuss prior art that teaches away from the claimed invention in the context of anticipation and obviousness, respectively.<

II. NONPREFERRED AND ALTERNATIVE EMBODIMENTS CONSTITUTE PRIOR ART

Disclosed examples and preferred embodiments do not constitute a teaching away from a broader disclosure or nonpreferred embodiments. *In re Susi*, 440 F.2d 442, 169 USPQ 423 (CCPA 1971). "A known or obvious composition does not become patentable simply because it has been described as somewhat inferior to some other product for the same use." *In re Gurley*, 27 F.3d 551, 554, 31 USPQ2d 1130, 1132 (Fed. Cir. 1994) (The invention was directed to an epoxy impregnated fiber-reinforced printed circuit material. The applied prior art reference taught a printed circuit material similar to that of the claims but impregnated with polyester-imide resin instead of epoxy. The reference, however, disclosed that epoxy was known for this use, but that epoxy impregnated circuit boards have "relatively acceptable dimensional stability" and "some degree of flexibility," but are inferior to circuit boards impregnated with polyester-imide resins. The court upheld the rejection concluding that applicant's argument that the reference teaches away from using epoxy was insufficient to overcome the rejection since "Gurley asserted no discovery beyond what was known in the art." 27 F.3d at 554, 31 USPQ2d at 1132.). Furthermore, "[t]he prior art's mere disclosure of more than one alternative does not constitute a teaching away from any of these alternatives because such disclosure does not criticize, discredit, or otherwise discourage the solution claimed.." *In re Fulton*, 391 F.3d 1195, 1201, 73 USPQ2d 1141, 1146 (Fed. Cir. 2004).

In addition, Karl et al. teach a combination of at least one non-pyrethroid insecticide, specifically, pirimiphos-ethyl, in combination with at least one insect repellent, specifically, DEET, as instantly claimed. . It is known in the art that combining insecticidal active increases the efficacy of an insecticide such that the maximum level of insects killed for a given application rate of an insecticide is increased, or alternatively, the application rate of an insecticide giving the maximum level of insects killed can be reduced.

With regards to the teaching of Skovmand, Applicant argues that KOVMAND provides pesticidal or pesticidal-repellent compositions for impregnation of fabrics comprising an insecticide and/or a repellent and that the insecticide is chosen

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from a long list of possible compounds (see, pages 8-11) and the repellent is chosen also from a long list of compounds (see, page 22). Applicant argues that the amount of pesticide is between 0.001 and 5% and the amount of repellent is between 0.001 to 1% of the dry weight of the fabric (see, page 13, lines 11-16 and 33-35) and that examples of compositions presented in SKOVMAND include 0.20 to 0.50 g of a pyrethroid insecticide such as alphacypermethrin, deltamethrin, and lambda cyhalothrin. (see, compositions pages 28, 33 and 34). Applicant further argues that no repellent is present in the specific compositions disclosed by SKOVMAND and like KARL, SKOVMAND disclose the use of lethal doses of pyrethroid insecticides in their compositions. Applicant argues that the references fail to teach or suggest any combination of insecticide and repellent below lethal concentration. However, Applicant's arguments are not persuasive. When considering a prior art's teaching, the whole reference is considered, including the examples. Further, according to MPEP 2123, "patents are relevant as prior art for all they contain":

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I. PATENTS ARE RELEVANT AS PRIOR ART FOR ALL THEY CONTAIN

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A reference may be relied upon for all that it would have reasonably suggested to one having ordinary skill in the art, including nonpreferred embodiments. *Merck & Co. v. Biocraft Laboratories*, 874 F.2d 804, 10 USPQ2d 1843 (Fed. Cir.), cert. denied, 493 U.S. 975 (1989). See also *>Upsher-Smith Labs. v. Pamlab, LLC*, 412 F.3d 1319, 1323, 75 USPQ2d 1213, 1215 (Fed. Cir. 2005)(reference disclosing optional inclusion of a particular component teaches compositions that both do and do not contain that component);< *Celeritas Technologies Ltd. v. Rockwell International Corp.*, 150 F.3d 1354, 1361, 47

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USPQ2d 1516, 1522-23 (Fed. Cir. 1998) (The court held that the prior art anticipated the claims even though it taught away from the claimed invention. "The fact that a modem with a single carrier data signal is shown to be less than optimal does not vitiate the fact that it is disclosed.").

>See also MPEP § 2131.05 and § 2145, subsection X.D., which discuss prior art that teaches away from the claimed invention in the context of anticipation and obviousness, respectively.<

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In addition, Skovmand teaches a combination of at least one non-pyrethroid insecticide, specifically, pirimiphos-ethyl, in combination with at least one insect repellent, specifically, DEET, as instantly claimed. It is known in the art that combining insecticidal active increases the efficacy of an insecticide such that the maximum level of insects killed for a given application rate of an insecticide is increased, or alternatively, the application rate of an insecticide giving the maximum level of insects killed can be reduced.

Next, Applicant argues that I the Office Action may have relied on hindsight analysis to modify the teachings of KARL and/or SKOVMAND because neither KARL nor SKOVMAND teach or suggest the combination of at least one non-pyrethroid insecticide, and at least one insect repellent, at lower than lethal concentration (LC100) of insecticide, teaching or suggestion can only be improperly obtained from the present specification. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

Moreover, Applicant argues that DEET, which itself has no KD effect or mortality effect, when combined with propoxur, is effective as deltamethrin. Applicant argues that this unexpected result allows reproduction of the characteristics of the pyrethroid insecticides. Furthermore, Applicant argues that these results are also valid on mosquito strains resistant to pyrethroids (see, Table 2). In example I, Applicant argues that , the propoxur concentration is reduced to 3.64 mg/m² for the resistant strain. DEET concentration remains at 364 mg/m² and that the composition kills 95% of the mosquitoes compared to only 8% for deltamethrin. Therefore Applicant concludes that one of ordinary skill in the art would not have predicted this result. However, Applicant's

arguments are not found persuasive because the results presented are not material to the instant claims because the claims are drawn to a product comprising at least one non-pyrethroid insecticide and at least one insect repellent. The recited genus of "non-pyrethroid insecticide" and "insect repellent" are very broad and the provided evidence is not commensurate in scope with this broadly claimed genus. Objective evidence of nonobviousness, if any, must be commensurate in scope with that of the claimed subject matter. *In re Kulling*, 14 USPQ2d 1056 (Fed. Cir. 1990); *In re Lindner*, 173 USPQ 356 (CCPA 1972). Further, in the Restriction/ Election Response file on November 8, 2010, Applicant elected, without traverse, pirimiphos-methyl (i.e., O-[2-(dimethylamine)-6-methyl-4 pyrimidinyl] O,O-dimethyl phosphorothioate) as the insecticide component and DEET (i.e., N,N-diethyl-meta-toluamine) as the insect repellent component. Therefore, the data presented in the specification do not read on the elected species.

Lastly, Applicant argues that the Office Action does not address claim 15 and that a method for preparing mosquito nets or clothes impregnated with insecticide, comprising impregnating the mosquito net or clothes with the composition as defined in claim 2, is not taught or suggested by the cited references. However, Applicant's argument is not found persuasive because Karl et al. teach impregnated textile material and a process for the impregnation of textile material which may be in the form of garments such as socks, trousers, shirts, etc. and nettings which are used for mosquito nets or covering (see claims 13 and 14 of Karl et al. and [0068]) and Skovmand teaches a process for impregnation of a fabric or netting as well as a composition for

impregnation of fabrics comprising the aforementioned insecticide/repellant combination wherein the composition comprises from about 0.001 to 95% by weight of the insecticide and/or repellant (claims 18 and 9 of Skovmand).

In light of the forgoing discussion, the Examiner concludes that the subject matter defined by the instant claims would have been obvious within the meaning of 35 USC 103(a).

Conclusion

No claims are allowed.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Courtney A. Brown whose telephone number is 571-270-3284. The examiner can normally be reached on 9:00 am-5:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Fereydoun Sajjadi can be reached on 571-272-3311. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Courtney A. Brown
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Technology Center 1600
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/JANET L. EPPS -SMITH/
Primary Examiner, Art Unit 1633